

On August 6, 2003 appellant, then a 54-year-old janitor, filed an occupational disease claim alleging that his post-traumatic stress disorder (PTSD), related to his military service in Vietnam was aggravated on June 16, 2003 when Alan Nielson, a coworker, grabbed him from

behind.¹ He alleged that Mr. Nielson walked behind him, grabbed his arms above the elbows very forcefully, and shoved him hard which startled him. Appellant turned and struck Mr. Nielson in the chest with his fist. He later became agitated and afraid that in the future he would strike another employee who grabbed him.² On another occasion, appellant was vacuuming Ms. Bishop's office when she came up behind him and called his name in a loud voice. He instinctively raised his arms to protect himself, almost hitting her. Appellant alleged that employees sometimes startled him intentionally because they found it amusing to see his reaction. Appellant stated that he did not advise Ms. Bishop of the incidents because he realized the employees meant no harm and were just trying to have a little fun and he did not want to cause them trouble. Conversely, he stated that Ms. Bishop should have advised the employees of his tendency to react violently to being startled. Appellant asked Ms. Bishop to write a letter saying he could not perform his job due to his tendency to be easily startled, so that he could be granted full disability retirement from the Department of Veterans Affairs. He also alleged that he was promised 34 hours of work a week but his hours were reduced to 14 hours after five months. Appellant alleged that, after the June 16, 2003 incident with Mr. Nielson, he was singled out for selective enforcement of employing establishment rules which led to his employment being terminated.³

Mr. Nielson stated that on June 16, 2003 he walked past appellant who started to back up into his path. He put his hands on appellant's shoulders to keep from bumping into him. Appellant turned around and struck him hard in the chest. Larry Palmer stated that Mr. Nielson "goosed or poked" appellant to get a reaction and appellant instinctively swung and hit him. He indicated that such incidents were common horseplay but Mr. Nielson should have stayed farther away because some individuals, like appellant, were jumpy and reacted "wildly." Mr. Grant stated that appellant was backing up into an aisle when Mr. Nielson walked past. He stated that, in order to avoid a collision, Mr. Nielson touched appellant on the shoulder and appellant turned and swung at Mr. Nielson who asked, "What did you do that for?" William Hudson stated that he was talking to appellant and Mr. Grant when Mr. Nielson walked behind appellant and touched him on the shoulder. When appellant turned around and hit Mr. Nielson in the chest with his closed fist, Mr. Nielson asked, "What was that for?" and walked away.

In a September 3, 2003 statement, Ms. Bishop stated that after the June 16, 2003 incident, she placed appellant on administrative leave, pending an investigation, because he had hit or kicked an employee on two prior occasions. She stated that appellant's work hours were reduced in October 2002 because of district-wide budget cuts. Appellant was offered a full-time position at another facility but he declined the job offer.

¹ While serving in Vietnam, appellant was wounded in the torso, arm and jaw.

² Following the June 16, 2003 incident, appellant was placed on administrative leave. His employment was terminated effective August 18, 2003 on the grounds that he was not fit for duty due to his hitting or kicking other employees on three occasions.

³ The record shows that appellant also filed an Equal Employment Opportunity complaint regarding these allegations.

In an August 27, 2003 note, Dr. Nita Weber, an internist and osteopath, stated that appellant was disabled because his PTSD had been exacerbated by the June 16, 2003 incident with Mr. Nielson. She reported that Mr. Nielson assaulted appellant by wrapping his arms forcefully around him to the point that he almost lost his balance and then turned and punched Mr. Nielson in the chest. Dr. Weber stated that appellant was afraid that someone would grab him again and he would injure that individual.

By decision dated October 28, 2003, the Office denied appellant's claim on the grounds that his emotional condition was not causally related to a compensable factor of employment.

Appellant requested an oral hearing that was held on June 22, 2004. At the hearing, Dr. Weber testified that she was appellant's primary care physician and had treated him for back problems, arthritis, insomnia and chronic pain. She testified these conditions worsened following the June 16, 2003 employment incident. Dr. Weber testified that she referred appellant to another clinic for treatment of his PTSD.

In reports dated November 25, 2003 and June 22, 2004, Dr. Weber reiterated that the June 16, 2003 incident exacerbated appellant's PTSD. She asserted that Mr. Nielson had intentionally bumped into appellant to provoke a reaction and management had acted abusively in allowing employees to deliberately startle appellant.

In a June 21, 2004 statement, Richard Aragon stated that he had worked with appellant at another post office where they both were subjected to harassment and pranks from supervisors and employees who liked to startle them with loud noises and sneak up behind them because they were Vietnam veterans with PTSD. He stated that employees hid behind corners and inside equipment and jumped out when he or appellant passed by, sneaked up behind them and yelled or dropped large objects. In a July 5, 2004 statement, Mike Spencer stated that he was appellant's supervisor at another facility and, although he was aware of his tendency to be easily startled due to his PTSD, he "would go out of [his] way to startle [appellant]" and "It became somewhat of a game to 'get' him." He indicated that he did not mean to upset appellant and "[t]o my knowledge he never took it personal."

By decision dated November 17, 2004, the Office hearing representative found that the incident on June 16, 2003 was a compensable factor of employment but the medical evidence did not establish that appellant's emotional condition was caused or aggravated by this employment factor.

Appellant requested reconsideration and submitted additional evidence.

In notes dated April 20, 2004, Mary K. Roberts, PhD, a licensed clinical staff psychologist for the Salt Lake City Health Care System, stated that appellant's last visit to the clinic was nine months previously at which time he was experiencing PTSD symptoms at work and was involved in an altercation which exacerbated his symptoms. She noted that he was seeking early medical retirement from the employing establishment. Appellant also submitted reports from a nurse, mental health clinical specialist and a social worker.

In an April 21, 2004 statement, Mr. Palmer again described the June 16, 2003 incident involving appellant and Mr. Nielson.

By decision dated January 19, 2005, the Office denied appellant's request for reconsideration.⁴

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁵ provides for the payment of compensation benefits for injuries sustained in the performance of duty. To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying compensable employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁷ the Board explained that there are distinctions in the type of employment situations giving rise to a compensable emotional condition under the Act. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the coverage under the Act.⁸ When an employee experiences emotional distress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁹ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁰ Generally, actions of the employing establishment in administrative matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage

⁴ Appellant submitted additional evidence with his appeal to the Board. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board has no jurisdiction to consider this evidence for the first time on appeal.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *George C. Clark*, 56 ECAB ____ (Docket No. 04-1573, issued November 30, 2004).

⁷ 28 ECAB 125 (1976).

⁸ *George C. Clark*, *supra* note 6.

⁹ *Lillian Cutler*, *supra* note 7.

¹⁰ *Id.*

of the Act.¹¹ However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹²

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁴

ANALYSIS -- ISSUE 1

Appellant alleged that that he was promised 34 hours of work per week but his hours were reduced. He alleged that management acted abusively when it terminated his employment following the June 16, 2003 incident. These allegations involve administrative or personnel actions that are not compensable under the Act absent evidence of error or abuse. The Board has held that mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.¹⁵ Ms. Bishop stated that appellant's work hours were reduced in October 2002 because of district-wide budgeted cuts. Appellant was offered a full-time position at another facility but declined the offer. Ms. Bishop stated that she placed appellant on administrative leave after the June 16, 2003 incident because appellant had hit or kicked an employee on two prior occasions. His employment was terminated effective August 18, 2003 on the grounds that he was not fit for duty due to hitting or kicking other employees. Ms. Bishop has provided a reasonable explanation for the reduction of appellant's work hours and his termination. Appellant has provided insufficient evidence that management erred or acted abusively in handling these administrative matters. Therefore, these allegations are not deemed compensable factors of employment.

Appellant alleged that Ms. Bishop should have advised the employees of his tendency to react violently to being startled. However, appellant stated that he did not advise Ms. Bishop of the incidents because he realized that the employees meant no harm and were just trying to have a little fun. Appellant acknowledged that he did not ask Ms. Bishop to speak to the employees

¹¹ *Michael L. Malone*, 46 ECAB 957 (1995).

¹² *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹³ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁴ *Id.*

¹⁵ *Janice I. Moore*, 53 ECAB 777 (2002).

about his potential reaction to being startled or surprised. There is no error or abuse established regarding this allegation. Therefore, this allegation is not a compensable factor of employment.

Appellant alleged that on June 16, 2003 Mr. Nielson grabbed his arms above the elbow very forcefully, and shoved him which startled him. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute a compensable employment factor.¹⁶ In this case, the Office hearing representative found that appellant established that the June 16, 2003 incident involving Mr. Nielson constituted an offensive touching which occurred in the performance of duty. Therefore, the issue is whether the medical evidence establishes that appellant's emotional condition was causally related to the June 16, 2003 employment incident.

Dr. Weber stated that the June 16, 2003 incident with Mr. Nielson exacerbated appellant's preexisting PTSD. She reported that Mr. Nielson intentionally wrapped his arms forcefully around appellant to the point that he almost lost his balance and he turned and punched Mr. Nielson in the chest. However, Dr. Weber is not a psychiatrist and there is no evidence that she was the primary treating appellant for his PTSD. In fact, she indicated at the hearing that she referred appellant to another clinic for treatment of his PTSD. Therefore, her opinion on causal relationship regarding his PTSD is of diminished probative value and is not sufficient to establish that the June 16, 2003 incident aggravated appellant's preexisting PTSD.

The Board finds that appellant has failed to establish that his emotional condition was causally related to a compensable factor of employment. Therefore, the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹⁷ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

"The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office;

¹⁶ Charles D. Edwards, *supra* note 12.

¹⁷ 5 U.S.C. § 8128(a).

or (3) constituting relevant and pertinent evidence not previously considered by the Office.¹⁸ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁹

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant submitted an April 21, 2004 statement in which Mr. Palmer described the June 16, 2003 incident. However, the Office had already accepted the June 16, 2003 incident as a compensable factor of employment. The remaining issue was whether the incident aggravated appellant's PTSD and this issue can only be established by medical evidence. Therefore, the statement from Mr. Palmer does not constitute relevant and pertinent evidence not previously considered by the Office.

In notes dated April 20, 2004, Dr. Roberts stated that appellant's last visit to the clinic was nine months previously at which time he was experiencing PTSD symptoms at work and was involved in an altercation which exacerbated his symptoms. She noted that he was seeking early medical retirement from the employing establishment. Dr. Roberts did not describe the June 16, 2003 incident or explain how it caused or aggravated appellant's PTSD. This evidence did not constitute relevant evidence not previously considered by the Office as it did not address the underlying issue of causal relation.

Appellant submitted reports from a nurse, mental health clinical specialist and social worker. The Board notes that reports from a nurse and mental health clinical specialist are of no probative value on the issue of causal relationship under the Act. A "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist.²⁰ Lay individuals such as physician's assistants, nurse practitioners and social workers are not competent to render a medical opinion.²¹ Therefore, the reports from the nurse, mental health clinical specialist and social worker do not constitute relevant and pertinent evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant failed to establish that his emotional condition was causally related to a compensable factor of employment. The Board further finds that the Office properly denied his request for reconsideration.

¹⁸ 20 C.F.R. § 10.606(b)(2).

¹⁹ 20 C.F.R. § 10.608(b).

²⁰ 5 U.S.C. § 8101(2).

²¹ See *Robert J. Krstyen*, 44 ECAB 227 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 19, 2005 and November 17, 2004 are affirmed.

Issued: September 19, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board